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IN THE

# Supreme Court of the United States

October Term, 1985

JAMES N. CONSTANT,

*Petitioner,*

*against*

ADVANCED MICRO-DEVICES, INC., et al.,

*Respondents.*

## BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

This petition for certiorari is to review an Order by The Court of Appeals for the Federal Circuit dismissing an appeal from an interim interlocutory order of the District Court. The basis for the dismissal by the Court of Appeals was that the District Court's interlocutory Order appealed from (Pet. Exh. "E")* had not been certified by the District Court as required by 28 USC § 1292(b) and (c).

* References to "Pet. Exh." herein are to the exhibits attached to the Petition for Writ of Certiorari.

Other than a later Order by the Court of Appeals denying petitioner's motion for leave to file a petition for rehearing on his dismissed appeal out of time, to vacate the Court's mandate, and to grant a writ of mandamus to direct the District Court to reverse one of its earlier interlocutory orders from which no appeal had been taken, no other Order from the Court of Appeals for the Federal Circuit has issued in this case. The action for patent infringement remains pending in the District Court for the Central District of California.

The petitioner misleads this Court by raising a number of purported "constitutional" issues including, inter alia, alleged denial of equal protection of laws. These claims are, however, totally illusory; they were not in any remote way the subject of the Order of the Court of Appeals from which petitioner seeks the intervention and review of this Court.

This petition should be denied since in reality no unusual question of law or fact is involved, there is no issue of public significance here, there has been no departure from the accepted and usual course of judicial proceedings, and the merely procedural matters involved have been thoroughly considered by the Court of Appeals. In short, no reason exists for the intervention of this Court.

## Statement of the Case

Petitioner, an individual appearing pro se, has sued seventeen companies, the respondents herein, alleging the infringement by each respondent of two of his patents. The

petitioner's original complaint contained, in addition to the cause of action for patent infringement, nine additional causes of action which all related to the respondents' allegations concerning the unconstitutionality of the federal patent and research and development laws.

Shortly after the complaint was filed, a motion to dismiss the nine non-infringement causes was filed and was granted on March 11, 1985. Petitioner, however, was granted leave to amend the complaint, and, thereafter, filed an amended complaint and then a second amended complaint which contained, in substance, the same nine previously dismissed causes of action, along with the cause of action for patent infringement.*

Respondents then moved to dismiss the nine non-patent infringement causes of action of the second amended complaint. By an Order dated July 11, 1985, the District Court granted the motion and for the second time dismissed these nine causes of the second amended complaint "with prejudice," and also denied plaintiff's request that the Court's ruling on the dismissed causes of action be certified pursuant to Fed.R.Civ.P. 54(b) and 28 USC § 1292(b). Petitioner did not take an appeal from this Order of dismissal.

The respondents then filed their answers to the remaining patent infringement cause of action, many asserting

* The action for patent infringement in the District Court is still pending and there has been, of course, no final decision or final judgment of the District Court from which any appeal could have been taken as a matter of right to the Court of Appeals. The parties have conducted extensive pre-trial discovery, and petitioner has filed pending motions for summary judgment on his claims for patent infringement.

both affirmative defenses under 35 USC § 282 and counterclaims for a declaratory judgment of patent invalidity and/or noninfringement. The petitioner then purported to reply to these counterclaims in the form of a series of "affirmative defenses" which, in substance, repeated his previously dismissed constitutional challenges. Petitioner also moved for summary judgment on these *dismissed* causes of action. The District Court, in an Order entered November 7, 1985, denied petitioner's motion for summary judgment. Petitioner also did not appeal from this order.

Seeking to circumvent the District Court's previous dismissal, petitioner then filed a motion, purportedly pursuant to Rule 57, F.R.Civ.P., for "declaratory judgment" that the federal patent and research and development laws were unconstitutional, in essence a third attempt to revive those portions of the complaint that had twice previously been dismissed with prejudice by the District Court.

In an Order entered on December 20, 1985 (Pet. Exh. "E"), the District Court denied the petitioner's motion for "declaratory judgment." Even though this Order did not contain the certification language required by 28 USC § 1292(b) to allow petitioner to appeal to the Court of Appeals for the Federal Circuit, the petitioner filed a Notice of Appeal to the Court of Appeals seeking appellate review of that Order.

The respondents NEC Electronics Inc. and Analog Devices, Inc. filed a motion to dismiss the petitioner's appeal solely on the grounds that the appeal was from an interlocutory order that had not been certified by the District Court as required for such interlocutory appeals by 28

USC § 1292. Many of the other respondents joined in the motion to dismiss.

That motion to dismiss the appeal was granted by the Court of Appeals for the Federal Circuit on February 21, 1986 (Pet. Exh. "A"), and on March 3, 1986, the Court of Appeals issued its mandate dismissing the petitioner's appeal. The grounds for the dismissal of the appeal were exclusively procedural in nature. That is, the dismissal was based on petitioner's failure to obtain certification for an appeal from a nonfinal, interlocutory judgment.

Petitioner then petitioned the Court of Appeals for the Federal Circuit for a rehearing out of time for the dismissed appeal; to vacate its mandate of March 3, 1986; and, by way of mandamus, to direct the District Court to reverse its earlier Order of July 11, 1985 dismissing petitioner's nonpatent claims with prejudice and from which, as noted, petitioner had never appealed. In an Order dated March 28, 1986 (Pet. Exh. "B"), the Court of Appeals for the Federal Circuit denied all of petitioner's requests. On May 7, 1986, petitioner filed this petition for writ of certorari, ostensibly for a review of the Court of Appeals Order of March 3, 1986, which dismissed the appeal.

## ARGUMENT

### There Is No Basis For This Court To Grant Certiorari

This Court has long made it clear that certiorari is to be granted "sparingly and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. &*

*Co.*, 240 U.S. 251, 258 (1916). This need to show an overriding or "imperative public importance" of the issues presented for review is even greater where, as here, there has been no final judgment in any court of any level. *See, e.g., United States* v. *Bankers Trust Co.*, 294 U.S. 240 (1935) and other cases listed in Rule 18 of this Court.

There is no conflict between the Order of the Court of Appeals for the Federal Circuit for which review is sought with any decision of any other Court of Appeals, nor has the Court of Appeals for the Federal Circuit in its Order in issue "so far departed from the accepted and useful course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision" as required in Rule 17.1(a) of this Court to grant review on a writ of certiorari.

The petition should also be denied because of the total lack of any "special and important reasons" presented in the petition, as required by Rule 17.1 of this Court, since, as noted, it does not even rise to the level of presenting any substantive issue for review; the *only* issue considered by the Court of Appeals was whether certification was required to take an appeal from an interlocutory Order.

**No "Constitutional", "Civil Rights", or "Political" Questions are Raised by the Petition**

The petitioner attempts to persuade this Court that the Order for which review is sought raises important constitutional questions involving the patent laws. By so doing, petitioner is misleading this Court. As can be readily seen, the Order of the Court of Appeals for the Federal

Circuit for which review of this Court is being requested (Pet. Exh. "A") merely dismisses petitioner's appeal to the Court of Appeals as a result of petitioner's failure to obtain the required certification to take an appeal from an interlocutory order.

Petitioner initially acknowledges that the present petition seeks a review of this Order, but then proceeds to completely ignore the Order. Petitioner instead raises issues that had not been considered by the Court of Appeals, but which had been considered and resolved only by the District Court when the lower court had previously issued its interlocutory Order from which petitioner took his uncertified, and subsequently dismissed, appeal.

Thus, whereas petitioner's motions in the District Court, which are *not* in issue here, may have involved a consideration of petitioner's theories regarding the patent laws, those issues are *not* properly raised by this petition since the *only* issue raised at the Appellate Court level, it bears repeating, was whether petitioner had the right to file an uncertified appeal from an interlocutory Order of the District Court. To state, as petitioner has done, that this narrow procedural issue raises constitutional and civil rights questions at best is to do violence to elemental concepts of logic and language. At worst, it is a willful and frivolous misuse of the judicial process, which should receive the sharpest possible censure by this Court in order to prevent its recurrence by this petitioner by awarding respondents any "appropriate damages" pursuant to Rule 49.2 of this Court.

**The Petition Should Be Denied Since The Underlying Action is Still Pending in the District Court**

The petition seeks this Court's review of only a part of a case which is still pending in the District Court and before a final judgment has been entered in this case by any court at any level. Since there is and can be no showing that the case is of such "imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court," the petition should be denied as required by Rule 18 of this Court.

## Summary and Conclusion

The Order of the Court of Appeals for the Federal Circuit does not present any point which merits the attention of this Court, and this petition should be denied with an award of "appropriate damages" to the respondents because of the frivolous nature of the petition.

Respectfully submitted,

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